

STATE of MICHIGAN
in the MICHIGAN SUPREME COURT

PAULETTE STENZEL,

Plaintiff/Appellee,

v

BEST BUY CO., INC. a Foreign
Corporation for Profit and **SAMSUNG**
ELECTRONICS AMERICA, INC. a
Foreign Corporation, for Profit,

Defendants/Appellants.

Supreme Court No. 156262
Court of Appeals No. 328804

Lower Court No. 14-000427-NO
Honorable Rosemarie Aquilina

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PLAINTIFF/APPELLEE'S RESPONSE TO
APPELLANT'S APPLICATION FOR LEAVE TO APPEAL
ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

A final Order dismissing the Plaintiff's case was entered on July 27, 2015 (Docket Entries 69 and 70).

Plaintiff Paulette Stenzel filed a timely Claim of Appeal on August 11, 2015, pursuant to MCR 7.204.

The Michigan Court of Appeals on December 22, 2016, issued a published decision reversing the Trial Court's granting of Defendant Best Buy's Motion for Summary Disposition based upon causation. The Court of Appeals also held in this Opinion that based upon the prior precedent of *Williams v Arbor Home, Inc*, 254 Mich App 439; 656 NW2d 873 (2002), vacated in part on other grounds 469 NW2d 898 (2003) that Defendant Samsung was not properly added as a party to this case and affirmed the Trial Court's granting of summary disposition as to Defendant Samsung. The Court of Appeals' Opinion disagreed with the holding of *Williams* and requested that the Court of Appeals convene a special Conflict Panel pursuant to, MCR 7.215(J)(2). (Exhibit 1, Court of Appeals' December 22, 2016, Opinion).

The Court of Appeals on January 17, 2017, ordered that a special panel be convened pursuant to MCR 7.215(1) to resolve the conflict between the present case and *Williams* and allowed the parties to file this Supplemental Briefs. (Exhibit 2, Court of Appeals' January 17, 2017, Order).

A conflict panel pursuant to MCR 7.215(J) was convened to resolve a conflict between *Stenzel v Best Buy Co, Inc*, 318 Mich App; 411; 898 NW2d 236 (2016) and *Williams v Arbor Home, Inc*, 254 Mich App 439; 656 NW2d 873 (2002), vacated in part on other grounds 469 Mich 898 (2003).

The conflict concerned the interpretation of and interplay between MCL 600.2957(2) and MCR 2.112(K)(4).

On June 27, 2017 a majority Opinion of the Conflict Panel held that there existed a conflict on a matter of procedure between the provisions of the court rule and the statute. The conflict was relative to whether a party must file a motion for leave to amend a pleading to add an identified nonparty at fault to an action, as provided by MCL 600.2957(2), or may simply file an amended pleading as a matter of course or right, as provided by MCR 2.112(K)(4), absent the need to seek court authorization for the amendment. The majority opinion also concluded that there is no conflict between the statute and the court rule on the substantive principle and intended outcome that a party will, in fact, be given an opportunity to pursue and litigate an amended pleading, assuming compliance with the 91-day deadline.

Accordingly, the trial court's Order granting Summary Disposition in favor of Samsung was reversed. A Concurring Opinion was also filed which also reversed the granting of Summary Disposition in favor of Samsung, (Exhibit 3, Court of Appeals' Conflict Panel's June 27, 2017 Opinion).

Appellant Samsung filed an Application for Leave to this Court on August 8, 2017.

STATEMENT of QUESTIONS PRESENTED

**I. WHETHER THE COURT OF APPEALS' CONFLICT PANEL
ERRED WHEN IT REVERSED THE TRIAL COURT'S ORDER
GRANTING DEFENDANT SAMSUNG'S MOTION for SUMMARY
DISPOSITION on the BASIS that MCR 2.112(K) DID NOT TOLL
THE STATUTE of LIMITATIONS on PLAINTIFF'S AMENDED
COMPLAINT**

Plaintiff/Appellee says "No."

Defendant/Appellant Samsung says "Yes."

The Trial Court says "Yes."

The Court of Appeals called for a Conflict Panel.

The Court of Appeals' Conflict Panel says "Yes"

STATEMENT of FACTS

The Plaintiff purchased a Samsung refrigerator/freezer from the Defendant Best Buy Co., Inc. on May 21, 2011, and contracted with the Best Buy to deliver and install this Samsung refrigerator/freezer at the Plaintiff's home on or about May 31, 2011. (Exhibit 4, Complaint, paragraphs 3-5).

On or about May 31, 2011, the Best Buy did install the Samsung refrigerator/freezer and connected its water dispenser and/or ice maker to a preexisting water line in the Plaintiff's home. (Exhibit 4, Complaint, paragraphs 3-5).

Approximately two (2) days subsequent to the installation, the water line connected to the Samsung refrigerator/freezer began spraying out water onto the Plaintiff's kitchen floor. (Exhibit 4, Complaint, paragraph 7).

Plaintiff testified that she began to clean up the water damage from the refrigerator in her bare feet and slipped and fell on the wet steps with her wet feet while attempting her second trip from the kitchen with the basket of wet towels. (Exhibit 5, Deposition of Paulette Stenzel, pp. 69-74 and 77-78).

Plaintiff was severely injured by her fall. She filed a lawsuit against Defendant Best Buy on April 29, 2014. (Docket Entry 1). Defendant Best Buy filed their Answer to the Plaintiff's Complaint on June 30, 2014. (Docket Entry 7).

Defendant Best Buy filed a Motion for Leave to File Notice of Non-Party at Fault naming Samsung Electronics of America, Inc. (hereafter referred to as Appellee Samsung) as a Non-Party at Fault on March 16, 2015, almost 9 months after they filed

their answer and approximately 10 months after the expiration of the 3 year Statute of Limitations for a product liability claim (Docket Entry 40). Plaintiff objected to this Motion. At oral argument **on April 1, 2015**, (emphasis added) the Trial Court granted Defendant Best Buy's Motion for Leave to File Notice of Non-Party at Fault naming Defendant Samsung and an Order was entered on April 20, 2015, (Docket Entry 49).

Defendant Best Buy also filed a Motion for Summary Disposition on the Plaintiff's Complaint (Docket Entry 35) which was orally argued one week later **on April 8, 2015**. (Emphasis added). Defendant Best Buy argued that the Plaintiff's injuries were not foreseeable in relation to the negligent conduct that the Plaintiff alleged in her Complaint. Their motion was granted and the case against Defendant Best Buy was dismissed with an Order entering on July 8, 2015, (Docket Entry 63).

On May 11, 2015, the Plaintiff filed an Amended Complaint adding Defendant Samsung as a party Defendant (Exhibit 6, Amended Complaint and Docket Entry 52).

Defendant Samsung did not file an Answer to the Plaintiff's Amended Complaint and instead filed a Motion for Summary Disposition based upon foreseeability and a Statute of Limitations defense. (Docket Entry 60). The Trial Court granted Defendant Samsung's Motion on both of these grounds and a final Order dismissing the Plaintiff's case was entered on July 27, 2015, (Docket Entries 69 and 70).

Plaintiff Paulette Stenzel filed a timely Claim of Appeal on August 11, 2015.

The Michigan Court of Appeals on December 22, 2016, issued a published decision reversing the Trial Court's granting of Defendant Best Buy's Motion for

Summary Disposition based upon causation. The Court of Appeals also held in this Opinion that based upon the prior precedent of *Williams v Arbor Home, Inc*, 254 Mich App 439; 656 NW2d 873 (2002), vacated in part on other grounds 469 NW2d 898 (2003), that Defendant Samsung was not properly added as a party to this case and affirmed the Trial Court's grant of summary disposition as to Defendant Samsung. The Court of Appeals' Opinion disagreed with the holding of *Williams* and requested that the Court of Appeals convene a Special Conflict panel pursuant to MCR 7.215(J)(2). (Exhibit 1, Court of Appeals, December 22, 2016, Opinion).

The Court of Appeals on January 17, 2017, ordered that a special panel be convened pursuant to MCR 7.215(1) to resolve the conflict between the present case and *Williams* and allowed Appellant to file this Supplemental Brief. (Exhibit 2, Court of Appeals' January 17, 2017, Order).

A Conflict Panel pursuant to MCR 7.215(J) was convened to resolve a conflict between *Stenzel v Best Buy Co, Inc*, 318 Mich App; 411; 898 NW2d 236 (2016) and *Williams v Arbor Home, Inc*, 254 Mich App 439; 656 NW2d 873 (2002), vacated in part on other grounds 469 Mich 898 (2003).

The conflict concerned the interpretation of and interplay between MCL 600.2957(2) and MCR 2.112(K)(4).

On June 27, 2017 a majority Opinion of the Conflict Panel held that there existed a conflict, on a matter of procedure, between the provisions of the court rule and the statute relative to whether a party must file a motion for leave to amend a pleading to add an

identified nonparty at fault to an action, as provided by MCL 600.2957(2), or may simply file an amended pleading as a matter of course or right, as provided by MCR 2.112(K)(4), absent the need to seek court authorization for the amendment. The majority Opinion also concluded that there is no conflict between the statute and the court rule on the substantive principle and intended outcome that a party will, in fact, be given an opportunity to pursue and litigate an amended pleading, assuming compliance with the 91-day deadline.

Accordingly, the trial court's Order granting Summary Disposition in favor of Samsung was reversed. A concurring Opinion was also filed which also reversed the granting of Summary Disposition in favor of Samsung, (Exhibit 3, Court of Appeals Conflict Panel's June 27, 2017 Opinion).

Appellant Samsung filed an Application for Leave to Appeal to this next court on August 8, 2017.

LAW and ARGUMENT

I. WHETHER THE COURT OF APPEALS' CONFLICT PANEL ERRED WHEN IT REVERSED THE TRIAL COURT'S ORDER GRANTING DEFENDANT SAMSUNG'S MOTION for SUMMARY DISPOSITION on the BASIS that MCR 2.112(K) DID NOT TOLL THE STATUTE of LIMITATIONS on PLAINTIFF'S AMENDED COMPLAINT

Appellate Standard of Review

We review a trial court's decision regarding a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). We review

issues of statutory interpretation de novo. *Fisher v Fisher*, 276 Mich App 424, 427; 741 NW2d 68 (2007).

Summary Disposition Pursuant to MCR 2.116(C)(7)

A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Patterson v Kleiman*, 447 Mich 429, 434, n 6; 526 NW2d 879 (1994).

**THE APPELLEE'S COMPLAINT WAS TIMELY and
WAS FILED WITHIN the STATUTE of LIMITATIONS**

Appellee Paulette Stenzle, like the Court's Opinion on page 5, would agree with the reasoning of Judge O'Connell in his partial dissent in *Williams*.

MCR 2.112(K)(1) and (4) read in pertinent part:

“(K) Fault of Non-parties; Notice

(1) Applicability. This subrule applies to actions based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death to which **MCL 600.2957** and MCL 600.6304, as amended by 1995 PA 249, apply.

* * *

(4) Amendment Adding Party. A party served with a notice under this subrule may file an amended pleading stating a claim or claims against the nonparty within 91 days of service of the first notice identifying that nonparty. (Emphasis added).

Samsung's Motion for Summary Disposition argued that MCL 600.2957(2) required a motion from the Plaintiff prior to the filing of an Amended Complaint.

MCL 600.2957(2) reads as follows:

(2) Upon motion of a party within 91 days after identification of a nonparty, **the court shall grant leave** to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action. (Emphasis added).

Although no party argued or briefed the *Williams* case in the Court of Appeals, the Court of Appeals in the present case reluctantly affirmed the Trial Court's grant of summary disposition to Defendant Samsung based upon the precedent of *Williams* and called for a conflict panel which was granted by a majority of the Judges of the Court of Appeals on January 17, 2017.

In *Williams*, the court held that there was no conflict between the provisions of MCL 600.2957(2) and MCR 2.112(K)(4) regarding the filing of an Amended Complaint naming a nonparty. The *Williams* Court rejected the plaintiff's argument that the court rule and statute are in conflict and that the court rule should therefore prevail. Instead, the Court adopted the defendant's argument that the statute merely includes more detail than does the court rule. Reading the statute and court rule together, the Court held that a defendant is required to file a motion and obtain leave of Court before filing an Amended Complaint naming a party identified in a Notice of Nonparty Fault.

The *Williams* Court's opinion respectfully erred because there is a conflict

between the court rule and the statute; the court rule does not require a Motion prior to the filing of an Amended Complaint and the statute does. The *Williams* Court failed to follow the precedent of the Court of Appeals case of *Staff v Johnson*, 242 Mich App 521; 619 NW2d 57 (2000) which held that there was a conflict. The *Staff* Court went on to hold

that: “When resolving a conflict between a statute and a court rule, the court rule prevails if it governs practice and procedure. *People v Strong*, 213 Mich. App. 107, 112; 539 N.W.2d 736 (1995). The Supreme Court is given exclusive rulemaking authority in matters of practice and procedure. Const 1963, art 6, § 5; *McDougal v Schanz*, 461 Mich. 15, 26; 597 N.W.2d 148 (1999). See also MCR 1.104 (“Rules of practice set forth in any statute, if not in conflict with any of these rules [the court rules], are effective until superseded by rules adopted by the Supreme Court.”)” *Staff* at 530-531.

However, the Staff Comment to the 1997 Amendment of MCR 2.112(K) clearly indicates that the amendment to the Court Rule by the Supreme Court was a procedural implement to MCL 600.2957 for the identifying and adding parties. This staff comment reads as follows:

“Staff Comment to 1997 Amendment

The November 6 amendment of MCR 2.112, relates to statutory changes made by 1995 PA 161 and 1995 PA 249.

New MCR 2.112(K) **governs the procedure for identifying non parties** whose conduct is claimed to be a cause of the injury, **and for adding them** as parties. See MCL 600.2957 and MCL 600.6304.” (Emphasis added).

The Court Rule MCR 2.112(K) references this statute and procedurally permits a plaintiff to add a non-party within 91 days after their identification *without* the need of a motion. This makes sense because the statute makes clear that once the party moves for leave to amend (which the non-party will have no notice of) the Court has no discretion to

deny the leave to amend. The Supreme Court in implementing the procedure of MCR 2.112(K) was preserving judicial economy and minimizing the costs of the parties.

Moreover, Michigan courts have traditionally held that "statutes of limitations are regarded as procedural, not substantive, in nature." *Lothian v City of Detroit*, 414 Mich 160, 166; 324 NW2d 9, 13 (1982). In the Michigan Supreme Court's case of *Gladych v New Family Homes*, 468 Mich 594; 644 NW2d 705 (2003), the Court addressed a conflict between a court rule and a statute regarding statutes of limitations. *Id.* at 600. The Court explained that if a statute concerns a matter that is "purely procedural and pertains only to the administration of the courts," the court rule controls. *Id.* If, however, the statute concerns "a principle of public policy, having as its basis something other than court administration," the statute controls. *Id.*

Michigan Court of Appeals' decisions issued after *Gladych* have found that statutes of limitations are procedural in nature. See *Davis v State Employees' Ret. Bd.*, 272 Mich App 151, 160; 725 NW2d 56, 62 (2006) ("In a general sense, statutes of limitations are regarded as procedural in nature."); *Hatcher v State Farm Mut. Auto. Ins.*, 269 Mich App 596, 605; 712 NW2d 744, 750 (2005) (noting that "[a] statute of limitations is a procedural, not substantive, rule"). See also, *Forest v Parmalee*, 402 Mich 348, 359; 262 NW2d 653 (1978); and *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 (1971).

The majority Opinion of the Conflict Panel recognized that amendment by leave and amendment by right are two separate and distinct procedural mechanisms.

They also recognized that the Michigan Supreme Court, having exclusive authority with respect to all aspects of the court rules and procedure, Const 1963, art 6, § 5.

MCL 600.2957(2), makes no mention of allowing or authorizing a party to file an amended pleading as a matter of right or within the 91-day window following identification of a nonparty at fault. It instead, allows amendment by the filing of a motion for leave to amend which the court must grant.

This mechanism was characterized by the Conflict Panel as, “wasteful in regard to time, energy, and resources, as to both the courts and litigants.” (Exhibit 3, p. 6),

The Conflict Panel held that there was no conflict between MCR 2.112(K)(4) and MCL 600.2957(2) with respect to the substantive principle and intended outcome that a party will, in fact, be given an opportunity to pursue and litigate an amended pleading. (Exhibit 3, p. 7)

The Michigan Constitution, art 6, § 5, provides that “[t]he supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state[,]” and MCR 1.104 states that statutory rules of practice “are effective until superseded by rules adopted by the Supreme Court.” In general, when a court rule conflicts with a statute, the court rule controls when the matter pertains to practice and procedure, but the statute prevails if the matter concerns substantive law. *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002). The Conflict Panel held the amendment of complaint was a matter of procedure. (Exhibit 3, pp. 7-8).

The Conflict Panel also held that the Supreme Court’s action in promulgating MCR 2.112(K)(4) was intended to provide assistance and details in implementing MCL

600.2957(2) where needed, not to nullify by silence the Legislature's clear desire to allow the relation back of an amended pleading for purposes of a given period of limitations. (Exhibit 3, p.9).

Accordingly, the Court of Appeals' Conflict Panel properly held that the holding in *Williams* be overruled and the order granting Defendant Samsung's Motion for Summary Disposition be reversed.

Even if *Williams* is Not Overturned, Appellant Moved For Leave to Amend Her Complaint

Even if this Court does not agree with the Conflict Panel and upholds *Williams*, the Plaintiff Appellee did ask for leave to amend her Complaint on the record.

At the April 1, 2015, hearing regarding Defendant Best Buy's motion to identify Sansung as a non-party at fault, Plaintiff/Appellee orally moved to amend their Complaint within 91 days, which was denied by the Court contrary to MCL 600.2957(2) because the Court wanted to instead amend the Scheduling Order. The following colloquy took place during Best Buy's motion at oral argument:

“THE COURT: Your motion is granted, sir. You'll prepare the order?

MR. TOWER: Yes.

THE COURT: Thank you.

MR. VILLAS: So, Your Honor, I have 91 days from the day of the order (to amend the complaint)?

THE COURT: No. What I'm going to do is ask you both to get together to revise the scheduling order because 91 now is not fair, is it counsel:

MR. TOWER: No, no.

THE COURT: So you both will stipulate to extend the scheduling order, and if you need me, please find me, and we will – the three of us will work together or we'll set a hearing. I'd prefer to not have another hearing if the three of us can work it out. I'm available most lunch hours. Please ruin one of mine.

MR. VILLAS: I wouldn't want to do that. I mean, the new Samsung attorney would want an input in the scheduling order.

THE COURT: Right.

MR. VILLAS: I mean, once we have to add him, I mean, we'll ask for a status conference with the new attorney. I mean, the order can say scheduling order suspended for now pending the adding of Samsung.

THE COURT: Well, the three of you can have a scheduling conference and then if you need my assistance, please ask for it. If not, you don't need it." (Exhibit 8, April 1, 2015 Oral Argument. p. 11 L, 18-25 and p. 12 L, 1-22)

The Plaintiff/Appellee orally made a request to amend the complaint to add Samsung as a Defendant within 91 days during the hearing. The Court denied the request to amend the Complaint to add Samsung, contrary to MCL 600.2957(2) and said she would convene a Scheduling Conference. Adding Appellee Samsung was also discussed throughout the hearing especially on pages 7-8 of the April 1, 2015, oral argument.

Motions during hearing do not need to be in written form pursuant to MCR 2.119(A)(1).

Unfortunately, one week after this oral argument the Trial Court granted Best Buy's Motion for Summary Disposition on causation so a scheduling conference never occurred. Plaintiff then filed her Amended Complaint pursuant to MCR 2.112(K) within 91 days.

The Plaintiff's request during oral argument complied with MCL 600.2957(2),

and the Trial Court should have granted leave to allow the Plaintiff to amend her Complaint.

Accordingly, since the Court allowed this filing under MCR 2.112(K), and the Plaintiff requested leave to file an Amended Complaint, the Plaintiff should have been allowed to amend her Complaint to add Appellant Samsung as a Defendant pursuant to MCL 600.2957(2) and the Trial Court's Ruling on Samsung's Motion for Summary Disposition must be overturned.

RELIEF REQUESTED

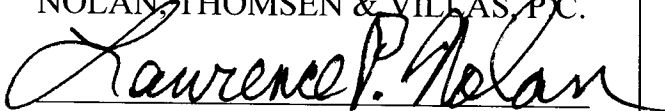
Appellee Paulette Stenzel prays that this Honorable Court uphold the Court of Appeals' Conflict panel's overruling *Williams v Arbor Home, Inc*, 254 Mich App 439; 656 NW2d 873 (2002), vacated in part on other grounds 469 NW2d 898 (2003), and overturn the Trial Court's ruling granting Samsung's Motion for Summary Disposition and remand this matter back to the Trial Court for a trial by jury against Defendant Best Buy and Defendant Samsung and grant Appellee any other relief that this Honorable Court deems equitable.

Respectfully submitted

NOLAN, THOMSEN & VILLAS, P.C.

Dated: September 5, 2017

By:



Lawrence P. Nolan (P25908)

Gary G. Villas (P43399)

Attorney for Plaintiff/Appellee

LIST OF EXHIBITS

- Exhibit 1 Court of Appeals' December 22, 2016, Opinion
- Exhibit 2 Court of Appeals' January 17, 2017, Order
- Exhibit 3 Court of Appeals' Conflict Panel June 27, 2017 Opinion
- Exhibit 4 Complaint, paragraphs 3-5
- Exhibit 5 Deposition of Paulette Stenzel, pp. 69-74 and 77-78
- Exhibit 6 Amended Complaint and Docket Entry 52
- Exhibit 7 April 1, 2015, Oral Argument. P. 11 L, 18-25 and p. 12 L, 1-22